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No. 77-1247

In the Supreme Court of the United States

OCTOBER TERM, 1977

RONALD GIBSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 567 F.2d 1237. The opinion of the district court (Pet. App. 40a-74a) is not reported. A prior opinion of the court of appeals (Pet. App. 75a-87a) is reported at 457 F.2d 1391.

JURISDICTION

The judgment of the court of appeals (Pet. App. 35a-36a) was entered on December 15, 1977. A

timely petition for rehearing was denied on February 1, 1978 (Pet. App. 38a-39a). The petition for a writ of certiorari was filed on March 7, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the record in this case establishes any direct negligence of government employees in failing to ensure that an independent contractor take additional precautions when dealing with aggressive youths.

STATUTES INVOLVED

1. 28 U.S.C. 1346(b) provides in pertinent part:

> Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2. 28 U.S.C. 2671 provides in pertinent part:

> * * * "Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.
>
> "Employee of the government" includes officers or employees of any federal agency * * *.

3. 28 U.S.C. 2680(h) provides in pertinent part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> * * * * *
>
> (h) Any claim arising out of assault, battery * * *.

4. Section 116(a)(3), Economic Opportunity Act of 1964, as added, 81 Stat. 681, 42 U.S.C. 2727(a)(3), provided:[1]

> For purposes of the Federal tort claims provisions in title 28, United States Code, [Job Corps] enrollees shall be considered employees of the Government.

STATEMENT

In 1966 petitioner was an employee of Federal Electric Company (FEC), which had contracted with the Office of Economic Opportunity (OEO) to operate the Camp Kilmer Job Corps Center at a federal reservation at Edison, New Jersey (Pet. App. 47a, 50a). On November 5, 1966, Andrew Jessie, one of the Job Corps enrollees at the Kilmer Center, stabbed petitioner with a screwdriver, severely injuring him

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[1] A substantially identical provision now appears in Section 416(a)(3), Comprehensive Employment and Training Act of 1973, 87 Stat. 872, 29 U.S.C. (Supp. V) 926(a)(3).

(Pet. App. 50a-52a). After collecting workers' compensation benefits from Federal Electric Company's insurer, petitioner brought this action in the United States District Court for the District of New Jersey under the Federal Tort Claims Act (Act), alleging that his injury was caused by the negligent or wrongful act or omission of employees of the United States.

The district court initially dismissed the complaint on the ground that the claim was one "arising out of assault [or] battery" and thus barred by 28 U.S.C. 2680(h). The court of appeals reversed and remanded for trial (Pet. App. 75a-87a), holding that the assault and battery exception of the Federal Tort Claims Act did not apply to the facts alleged in the complaint, which included an allegation that the government itself negligently controlled the Job Corps enrollees at the Kilmer Center (Pet. App. 80a-82a). In the court of appeals' view, although any action on the stabbing itself would be barred by Section 2680 (h), the United States still might be liable for failure to prevent the stabbing.[2]

After a non-jury trial, the district court found that "[a]lthough O.E.O. had broad supervisory authority over the Camp Kilmer Job Corps Center, control over the Center's day-to-day operations resided in [Federal Electric Company]" (Pet. App. 47a). Despite this

[2] The court also stated that the assault exception might not be applicable if Jessie were under the influence of narcotics at the time of the stabbing (Pet. App. 84a). The district court found that Jessie was not under the influence (*id.* at 63a), and this question has dropped out of the case.

fact, the district court held that the United States is liable "for the negligence of [Federal Electric Company]" under the doctrine of *respondeat superior* (*id.* at 66a). The court reasoned both that OEO exercised general supervisory control over Job Corps Centers (*id.* at 65a-66a) and that the Job Corps program was an "inherently dangerous activity," making the government liable for the contractor's negligence (*id.* at 66a-67a).

Following a separate trial on damages, the district court in September 1976 entered a final judgment of $106,980 against the United States (Pet. App. 5a).

The court of appeals reversed (Pet. App. 1a-21a). Noting that the district court did not have the benefit of *United States* v. *Orleans*, 425 U.S. 807, the court of appeals held that *Orleans* foreclosed both theories on which the district court had relied.[3] The court initially held (Pet. App. 11a-12a):

[3] The district court's theories of vicarious liability were essential to its judgment. Although Jessie, as a Job Corps enrollee, was treated as a federal employee (see 42 U.S.C. (1970 ed.) 2727(a)(3)), that does not assist petitioner; "Jessie's actions cannot be imputed to the United States because the [Act] does not apply to any 'claim arising out of assault [or] battery. . . .' 28 U.S.C. § 2680(h)" (Pet. App. 10a n. 7). As the court of appeals recognized in its first decision, only the negligent supervision of Jessie could give rise to liability. (Although we believe that imposing liability for failure to prevent a battery is functionally indistinguishable from imposing liability for the battery itself (see Pet. App. 54a-63a), there is no reason for this Court to consider whether the court of appeals erred in stating that liability could be proved under this theory. If the Court should grant the petition, however, we would argue that the bar of Section 2680(h) offers an alternative ground to affirm the court of appeals' judgment.)

> While it may be argued that OEO exercised a greater degree of control over the Job Corps program and the FEC, than it did over community action agencies of the type involved in *Orleans*, nonetheless the district court specifically found that the government exercised no operational, day-to-day control over Camp Kilmer or FEC's employees.
>
> * * * The fact of broad, supervisory control, or even the potential to exercise detailed control, cannot convert a contractor into an agent, nor can it be the basis for imposing vicarious liability on the United States. *United States* v. *Orleans*.

The court of appeals also held (Pet. App. 14a-15a) that petitioner could not recover under the "inherently dangerous activity" doctrine because that doctrine imposes liability on an employer for the negligence of a contractor, while the Act allows recovery only for the negligence of the government's employees. See 28 U.S.C. 1346(b); *United States* v. *Orleans, supra*.[4]

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[4] Aside from holding that the "inherently dangerous activity" doctrine is not available under the Federal Tort Claims Act, the court of appeals pointed out that "[w]hether the facts of this case present a situation to which [that doctrine] may properly be applied is not at all clear. We are not convinced that a Job Corps center * * * is inherently dangerous" (Pet. App. 13a n. 10). In addition, the court of appeals observed that the doctrine may be "limited to third parties such as innocent bystanders or adjacent landowners" and not available to petitioner, who was an employee of the independent contractor (*ibid.*). In view of its disposition of the case, the court did not resolve these questions.

The court of appeals then considered a third theory of liability—that of alleged "direct negligence" of the United States, based on the theory "that OEO had notice of a dangerous situation, by virtue of the fact that it knew that many enrollees were drug users, had criminal records, or were otherwise potentially violent * * *" (Pet. App. 17a). Under this theory OEO purportedly had a direct "duty to the [petitioner] * * * to take reasonable measures to assure adequate discipline and security" (*ibid.*). With respect to this theory, the court held (*id.* at 17a-18a):

> Assuming without deciding that such a theory of liability is a viable one under the FTCA, and that no discretionary function was implicated, nevertheless the record in this case will not support a recovery for [petitioner]. The factual findings of the district court, rather than showing a breach of duty by the Government, demonstrate that OEO had taken reasonable measures to provide for security at the Kilmer Center.

The court then analyzed the record and the district court's findings; it concluded (Pet. App. 20a-21a):

> The record reveals that OEO, in light of the supervisory nature of its responsibilities, properly discharged whatever obligation it had to assure adequate security at Kilmer. In sum, it appears that OEO after formulating its policies, made them known to FEC, informed FEC of its [FEC's] responsibilities, required FEC to take certain basic precautions, and provided FEC with sufficient authorization to do what was necessary in order to perform its functions.

> Lacking operational control over the activities at Kilmer, the United States cannot be held liable for the lack of proper security facilities at Camp Kilmer.

Judge Adams concurred in the court's conclusion that the government was not vicariously liable, but he would have found the government negligent in failing to protect petitioner from his assailant (Pet. App. 22a-34a). Judge Adams remarked, however, that his "difference with the majority rests primarily upon our divergent interpretation of the factual record in this case" (Pet. App. 25a).

ARGUMENT

Petitioner appears to contend that the court of appeals erred in concluding that OEO was not negligent in taking reasonable measures to assure adequate security at the Camp Kilmer Job Corps Center (Pet. App. 16a-21a). This issue does not warrant review by this Court. First, it depends on facts peculiar to this record. Second, the district court did not find that employees of the United States were directly negligent. Only out of an abundance of concern did the court of appeals address the "possibility" that the district court had adopted any theory of direct negligence on which to predicate liability (Pet. App. 16a-17a).[5]

[5] The only arguable basis for concluding that the district court made such a finding is its statement that the Government "breached its duty [to exercise reasonable care to ensure the safety of persons coming in contact with its trainees]

The "direct negligence" issue was neither briefed nor argued in the court of appeals, and that court did not decide whether the government owed petitioner any duty to protect him from enrollees (Pet. App. 17a). It merely decided, on the basis of the record, that even assuming such a duty existed, the government did not breach it (*id.* at 18a-21a). The aspect of the decision of which petitioner complains thus did not resolve any disputed question of law; as Judge Adams explained (*id.* at 25a), the court simply dealt with factual inferences. We rely on the court of appeals' analysis of these questions.[6]

when it failed to provide for adequate safety precautions and is thus liable to the plaintiff regardless of the fact that it delegated certain functions to [Federal Electric Company], an independent contractor" (Pet. App. 67a). But it is apparent that the district court was referring to the "inherently dangerous activity" doctrine of liability, under which it held the United States vicariously liable "for the negligence of F.E.C." (Pet. App. 66a), rather than to any direct negligence theory.

[6] The court's conclusion that the Act does not allow a contractor's negligence to be imputed to the government under the "inherently dangerous activity" doctrine (Pet. App. 12a-16a) appears to perpetuate a conflict among the circuits on this matter. Compare *McGarry* v. *United States*, 549 F.2d 587 (C.A. 9), certiorari denied, October 31, 1977 (No. 77-286), and *Thorne* v. *United States*, 479 F.2d 804 (C.A. 9), with this case and *United States* v. *Page*, 350 F.2d 28, 34 (C.A. 10), certiorari denied, 382 U.S. 979. Although the Court denied our petition for certiorari in *McGarry*, we continue to believe that the scope of federal liability for the torts of contractors performing "inherently dangerous" tasks is important and should be decided by this Court. The present case, however, does not require resolution of the question. Petitioner does not discuss the conflict or challenge the court's

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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ruling that the "inherently dangerous activity" doctrine is inconsistent with the independent contractor limitation of the Act. Moreover, whether that doctrine could be applied to the facts of the case is highly doubtful. As the court of appeals noted, it is not at all clear whether a Job Corps center is an "inherently dangerous activity" (Pet. App. 13a n. 10). Indeed, under New Jersey law the doctrine may not be available to petitioner even if the Center was inherently dangerous, because petitioner was an employee of the contractor, not a third party (*ibid.*). There is no reason for this Court to address these questions of state law or to attempt to resolve the disputed characterization of Job Corps centers.

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